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No. _____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term, 2002

MARK K. HOLLIS,
JOURNALIST FIRST CLASS, UNITED STATES NAVY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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73 pp

QUESTION PRESENTED

Should the medical hearsay exception divest a criminal accused of his Sixth Amendment Confrontation Clause right when the doctor is acting primarily as a criminal investigator rather than as a physician?

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In The

SUPREME COURT OF THE UNITED STATES

MARK K. HOLLIS

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v.

UNITED STATES OF AMERICA,

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Mark K. Hollis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in his case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Hollis*, 57 M.J. 74 (C.A.A.F. 2002), is located in Appendix A at 1a-23a. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals, 54 M.J. 809 (N-M. Ct. Crim. App. 2000) is located in Appendix B at 24a-47a.

JURISDICTION

The lower court granted review of Petitioner Hollis' case and affirmed his conviction for rape, forcible sodomy, and indecent acts on July 23, 2002. He invokes this Court's jurisdiction under 28 U.S.C. § 1259(3)(2002).

CONSTITUTIONAL PROVISION AND MILITARY RULE OF EVIDENCE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Military Rule of Evidence 803(4), "Hearsay exceptions; availability of declarant immaterial," found in Manual for Courts-Martial (M.C.M.), United States (1998 ed.), Part III, and reprinted in relevant part in Appendix U, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (4) *Statements for purposes of medical diagnosis or treatment.* Statements for purposes of medical diagnosis or treatment and

> described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

STATEMENT OF THE CASE

I. Statement of the Facts

Petty Officer Hollis reported for duty at the U.S. Naval Support Activity, Naples, Italy while his estranged wife and two daughters remained in Arizona. His daughters, J.H, then five years old, and R.H., then three years old, remained in the custody of their mother until they joined Petty Officer Hollis in Italy in 1996. Ms. Kathy Robie, a civilian, escorted J.H. and R.H, to Italy and began employment as their live-in nanny. Ms. Robie had worked with Petty Officer Hollis's mother for three years and viewed the nanny job as an opportunity to learn about the culture and the people of Italy.

Ms. Robie's relationship with Petty Officer Hollis slowly deteriorated. Ms. Robie testified that she had paid for the plane tickets to fly the girls to Italy by liquidating her savings and retirement accounts. In return, she claimed that Petty Officer Hollis didn't treat her well. Their relationship came to an end when Petty Officer Hollis purchased her a plane ticket back to the United States.

On August 11, 1997, about ten days after receiving her ticket, Ms. Robie called Ms. Lyn Flahardy of the Navy Family Service Center, Naples, Italy, and reported her suspicion that J.H., then six years old, had been sexually abused the previous evening. Following standard protocol, Mrs. Flahardy then contacted the Naval Criminal Investigative Service (NCIS); a staff pediatrician at the U.S. Naval Hospital, Naples, Lieutenant (Dr.) Steven J. Novek, Medical Corps, U.S. Navy; and the Family Service Center's child psychologist, Dr. Michele Bieraugel.

NCIS Special Agent (SA) Kevin B. Hutson and his supervisor were immediately dispatched and they drove J.H., R.H., and Ms. Robie to the U.S. Naval Hospital, Naples, Italy. At the hospital, Dr. Novek proceeded to examine J.H. in the presence of SA Hutson, Mrs. Flahardy, and Hospitalman Third Class (HM3) Laura Rodriquez-Calderon. Dr. Novek's final conclusion was that the physical exam was "highly suspicious for abuse but not conclusive." SA Hutson and Mrs. Flahardy interviewed J.H. afterwards at the NCIS office.

In a sworn statement made that same afternoon Petty Officer Hollis explained that J.H. had been sexually abused while living with her mother in Arizona. Petty Officer Hollis stated that the abuser was a boy named Marcus, the son of her mother's boyfriend. Petty Officer Hollis further stated that because he wanted to "assess the impact of what had transpired in Arizona," he role-played with J.H. for a

period of about three months. Petty Officer Hollis stated that his role-playing consisted of talking to J.H. about what may have happened to her, and asking her to show him what had happened to her.

Ms. Flahardy asked Dr. Bieraugel, the Family Service Center child psychologist, to conduct an assessment of J.H. and Petty Officer Hollis. Dr. Bieraugel interviewed J.H. and Petty Officer Hollis on August 14, 1997 and reviewed Dr. Novek's medical report. J.H. specifically denied any fellatio or digital penetration, and Petty Officer Hollis explained his attempts at role-playing with J.H. Dr. Bieraugel's initial finding was that J.H. had been sexually abused, but the perpetrator's identity was unclear. She stated that it was possible that Petty Officer Hollis' role-playing had confused J.H., who could have believed the role-playing was sexual activity, and confused the role of Petty Officer Hollis with that of Marcus. At trial however, Dr. Bieraugel, testified that "after repeated questions by many people," she did not believe J.H. was transferring memories of prior abuse onto her father.

Captain (Dr.) Barbara Craig, Medical Corps, U.S. Navy, is a pediatrician at the National Naval Medical Center, Bethesda, Maryland, and also a medical consultant for the Naval Criminal Investigative Service, the Department of the Navy, and the Department of Defense for child abuse and neglect. Less than two weeks after Dr. Bieraugel's initial assessment that J.H. had been sexually abused and that the perpetrator's identity had been unclear, the

trial defense counsel contacted Dr. Craig. He requested her assistance in reviewing the evidence available and in evaluating the children. She was specifically tasked with determining whether the prior abuse occurred and whether J.H. had transferred those memories to her father due to his role-playing.

Dr. Craig interviewed J.H. and R.H. on September 4, 1997 at the National Naval Medical Center, Bethesda, Maryland. She again interviewed J.H. on September 30, 1997 in the presence of a law enforcement officer. The meeting on September 30, 1997 took place not in the Pediatric Center of the Bethesda National Naval Medical Center, but rather at the medical center's NCIS office. During this meeting no physical examination was conducted; rather, Dr. Craig simply asked Julie questions. The result of this interview was faxed directly to NCIS agents in Naples, Italy. Dr. Craig testified that she faxed the results of her interview with Julie to the NCIS in Italy because she felt that her questioning could be used as evidence. Dr. Craig interviewed J.H. a third time on October 23, 1997, at the prosecutor's request, and purposefully elicited information rebutting Petty Officer Hollis' statement to NCIS regarding his role-playing with J.H.

Prior to trial, the trial defense counsel moved to exclude Dr. Craig's anticipated testimony on behalf of the Government regarding J.H. and R.H.'s statements. The military judge did not rule on the motion because he believed it was premature.

At trial, neither J.H. nor R.H. testified. Dr. Novek, Dr. Craig, and Dr. Bieraugel testified for the government. The trial defense counsel raised hearsay objections to Dr. Novek's testimony regarding J.H.'s statements and also Dr. Craig's testimony regarding J.H. and R.H.'s statements. The military judge found that all of the statements fell within the medical hearsay exception set forth as Military Rule of Evidence 803(4) and the objections were overruled.

Petty Office Hollis was found guilty of all charges based primarily on the testimony of Dr. Novek and Dr. Craig regarding what Julie and Rachel said to them out of court.

II. Proceedings Below

The United States Navy charged Petty Officer Hollis with raping, sodomizing, committing indecent acts with, and taking liberties of, J.H. on divers occasions during July and August 1997. Petty Officer Hollis elected to be tried by the military judge alone and was tried on March 30 through April 2, 1998. Petty Officer Hollis entered pleas of not guilty to all charges. The military judge convicted Petty Officer Hollis of rape, sodomy, and indecent acts. He sentenced Petty Officer Hollis to be reduced to paygrade E-1, to forfeit all pay and allowances, to be confined for a period of twenty two years, and to be discharged from the service with a dishonorable discharge. The convening authority approved the sentence as adjudged.

On appeal before the United States Navy-Marine Corps Court of Criminal Appeals, Petty Office Hollis challenged his convictions as having been based on an unconstitutional application of the medical hearsay exception and several other issues unrelated to this petition. The United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and the sentence as approved on December 15, 2000. *United States v. Hollis*, 54 M.J. 809 (N-M. Ct. Crim. App. 2000).

On appeal before the Court of Appeals for the Armed Forces of the United States, Petty Officer Hollis again challenged the constitutionality of the trial court's application of the medical hearsay exception. On July 23, 2002, the United States Court of Appeals for the Armed Forces affirmed the convictions and the sentence. *United States v. Hollis*, 57 M.J. 74 (C.A.A.F. 2002).

REASONS FOR GRANTING THE PETITION

The military courts of appeals are misapplying the medical hearsay exception recognized and affirmed by this Honorable Court in *White v. Illinois*, 502 U.S. 346 (1992), and as set forth in Military Rule of Evidence 803(4). In this case the military courts of review have erroneously affirmed a conviction which was obtained primarily on the basis of the hearsay statements of two very young child witnesses that were obtained and presented by medical doctors who were acting as *de facto* government investigators. Moreover, several statements from the girls, which were made explicitly

in preparation for trial, were presented at trial under the medical hearsay exception in direct derogation of military law.

This Honorable Court, in *White v. Illinois*, determined that the medical exception to the general prohibition against the admission of hearsay evidence at trial is a "firmly-rooted" exception. *White v. Illinois,* 502 U.S. 246, 355. As a firmly-rooted exception, evidence admitted under the medical hearsay exception does not implicate a defendant's right to confront the witnesses against him as secured by the Sixth Amendment to the Constitution of the United States. This is so because, as this Honorable Court has determined, "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." *Id.* at 357 (quoting *Idaho v. Wright*, 497 U.S. at 820-821). A defendant's right to confront the witnesses against him is not implicated by admission of medical hearsay because it is long-accepted that a person seeking medical treatment has a powerful interest in telling the truth and, therefore, in-court cross-examination of the patient is unlikely to yield additional useful information. Further, as this Honorable Court also observed in *White v. Illinois,* "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think [able to be] replicated by [later] courtroom testimony." *White v. Illinois,* 502 U.S. 346 at 356.

Current military practice, however, as demonstrated in Petitioner's case, runs wide of the reasoning and guidance of this Honorable Court, and therefore afoul of the Sixth Amendment Confrontation Clause. This is due to the dual nature of the military pediatrician as both medical care provider and investigator in cases of suspected child abuse. The difficulty is that military pediatricians are, by deliberate design and, in many cases, by extensive legal training, also skilled criminal investigators who actively seek to elicit and preserve statements of injury causation and perpetrator identity for the express purpose of presenting such statements at criminal trials. Because this is true, statements elicited by military pediatricians as to injury causation and perpetrator identification generally do not have the special guarantees of trustworthiness upon which an accused may be deprived of his or her Sixth Amendment Confrontation right in that these statements may have in the non-military setting. Examination of the relationship between the military pediatrician and the military prosecutor is helpful to understanding why statements made to military pediatricians do not have special guarantees of trustworthiness sufficient to fall within the medical hearsay exception.

The Armed Forces of the United States have medical corps, consisting of thousands of medical providers, medical doctors, specialists, corpsmen, nurses, etc., by which the medical needs of United States service members are met in peace and in war.

In times of peace, the extra capacity of the medical corps provides the families of service members with comprehensive medical treatment largely free of cost. Except for having no cost, the provision of medical services in the military appears to operate in the same manner as civilian medical services. However, unlike civilian medical doctors, military doctors are commissioned officers, hold military rank, and are accountable to military superiors. The military superiors, typically also military doctors and commissioned officers themselves, have tremendous additional responsibilities beyond that of ensuring the provision of medical care to service members and their families. One such responsibility is the maintenance of good order and discipline of military units. In this regard, military doctors are often compelled by their military superiors to take training in forensics for the express purpose of being useful witnesses in criminal trials. As a general proposition this appears to be a valid and efficient use of military resources. However, where the application of such training is for the purpose of depriving the criminal accused of his right to confront the witnesses against him, the use violates the Constitution.

The Constitutional violation arises where the military doctor serves, by design, in the dual roles of pediatrician and criminal investigator. As a pediatrician, the doctor seeks to discover the root cause of the child's complaint, injury, or disease. In this regard, if the allegation or complaint leads to a suspicion of child abuse, the pediatrician will inquire as to the identity of the alleged abuser and the

veracity of the allegations, for the purpose of removing the child from the source of injury or abuse. If this investigation, which was initiated for the valid medical purpose of removing the child from the source of injury or abuse also leads to the uncovering of illegal activity and or the identity of the abuser, the information is reported to law enforcement. In due course, if the abuser is ultimately prosecuted, the pediatrician may be called to give testimony as to the identity of the abuser or the source of the injuries in the courtroom under the medical hearsay exception. In the military, however, this typically is not the end of, nor a proper description of, the involvement of the pediatrician.

As was the case in Petty Officer Hollis' trial, the military pediatrician is often called upon to conduct further interviews and medical examinations of the alleged victims. In these subsequent interviews, which are often made well after a confirmed diagnosis of child abuse, the pediatrician seeks confirmation of abuser identity from the child victim. Information as to abuser identity gleaned from these post-diagnosis interviews is often presented by the prosecution in lieu of actual testimony by the child witness. In many instances these additional interviews and medical examinations are conducted by military pediatricians who have been selected primarily, if not exclusively, for their expertise in forensic pediatrics. In the case at bar, Captain (Dr.) Barbara Craig, Medical Corps, U.S. Navy, was selected for the subsequent interviews and examination because, as other lower military courts have noted, she is "a pediatrician well qualified

in the area of child sexual abuse." *United States v. Hammer*, 2002 CCA LEXIS 42, *19; *c.f. United States v. Marshall*, 52 M.J. 578 (C.A.A.F. 1999); *c.f. United States v. Muirhead*, 48 M.J. 527 (C.A.A.F 1997). Indeed, at trial Dr. Craig claimed that she has testified "eighty to ninety" times in child abuse cases and that she has received specific formal training in the areas of "collecting forensic evidence" and "testifying in court."

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig,* 497 U.S. 836, 845 (1990). "When the government seeks to offer a declarant's out-of-court statements against the accused, . . ., courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant 'to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth."'" *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (citing to *California* v. *Green,* 399 U.S. 149, 158 (1970)). Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carry special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony. *Id.* at 126 (citing again to *California* v. *Green,* 399 U.S. 149, 356 (1970)).

Dr. Craig conducted subsequent interviews and a subsequent medical examination in this case of J.H. and an initial interview and examination of R.H. These subsequent interviews by Dr. Craig of both J.H and R.H. do not have the guarantees of trustworthiness necessary to qualify for inclusion in the medical hearsay exception identified by this Honorable Court in *White v. Illinois* and *Lilly v. Virginia* and set forth in the Military Rules of Evidence, Rule 803(4). This is so because the guarantees of trustworthiness identified by this Court arise from the physician-patient relationship wherein the physician and patient are wholly invested in the gravely serious endeavor of healing the patient. In this sober relationship it is presumed that the medical provider is solely concerned with the health of the patient. In the case of the military pediatrician who has been asked to conduct subsequent interviews for the purpose of gathering evidence for presentation at trial, it cannot be said that the sole focus of the physician-patient relationship is the health of the patient and therefore the guarantees of trustworthiness are indicted. Where the physician becomes investigator, even where the change of roles is transparent to the patient, the guarantees of trustworthiness of the hearsay are impugned in that the pediatrician has become an organ of the prosecution no different than a police detective who has convinced the patient that he is a doctor. In other words, where the physician-patient relationship is intermixed with that of a criminal investigator-victim relationship, the guarantees arising from the original relationship no longer exist in that the

questions asked by the now criminal investigator pediatrician are being asked not for the purpose of advancing the medical well-being of the patient, but rather, towards the conviction of the alleged wrong-doer. Thus, where a question does not have its origin in the healing of the patient, the answers to such a question, as well, cannot.

Military courts-martial require that two precedent conditions be satisfied to make medical hearsay statements admissible. First, the declarant must have "some expectation of promoting his well-being and thus an incentive to be truthful." *United States v. Nelson*, 25 M.J. 110, 112 (C.M.A. 1987), *cert. denied*, 484 U.S. 1061 (1988). Second, the statements must be made by a declarant "for the purposes of [medical] diagnosis and treatment." *Id.* at 112. Statements are not limited only to medical doctors and statements made to psychologists may satisfy the rule. *Id.* at 112-3; *United States v. Welch,* 25 M.J. 23, 24 (C.M.A. 1987). Statements made to prosecutors, even when made in the presence of a treating psychologist, do not satisfy the rule. *United States v. Armstrong,* 36 M.J. 311, 313 (C.M.A. 1993). Statements made by the victim to the prosecutor, not by the victim to a doctor, physician, or other medical person, even when made in the presence of such a person, are considered statements made "in preparation for trial" and are not admissible under the exception. *Id.* Moreover, the military courts of appeal have stated "[w]e will not condone efforts to extend Mil.R.Evid. 803(4) to include the testimony of a psychiatrist whose examination of an alleged victim

was more oriented to his testifying at trial than to medical diagnosis or treatment." *United States v. Deland,* 22 M.J. 70, 75 (C.M.A. 1986).

The court below erred in holding that the trial judge did not abuse his discretion when he allowed Dr. Craig and Dr. Novek to testify about what J.H. and R.H. told them during their interviews. As set forth below, the evidence strongly suggests that the primary or concomitant purpose of the interviews was to collect incriminating evidence. Because the interviews were for, at best, a mixed purpose, that is a purpose other than that of healing, they should not be utilized in a manner which deprives an accused of his Sixth Amendment Confrontation right. This is particularly so where the other purpose of the military pediatrician is to act in favor of, or worse yet, on behalf of, the prosecutor.

The evidence gathering nature of the medical interviews was obvious. An NCIS special agent drove J.H. to the Naval Hospital in Naples, Italy, on August 11, 1997 for the first examination. The physician who examined J.H. that day was Dr. Novek. The same agent who drove J.H. to the hospital, NCIS SA Hutson, was present during Dr. Novek's entire initial "medical history" interview of J.H. The record reveals that SA Hutson, who is not a physician, but rather a criminal investigator, asked J.H. questions during the supposed "medical" history interview which was conducted prior to the physical evaluation. The answers to SA Hutson's questions were intermixed in Dr. Novek's final "medical" report.

At the conclusion of the interview Dr. Novek asked all of the persons present, SA Hutson, a military family services counselor named Lyn Flahardy, and a Navy medical corpsman named Hospitalman Third Class Rodriques-Calderone, whether or not any of them had any further questions for J.H. The final report was an amalgamation of five pages of notes taken by the medical corpsman and two pages taken by Dr. Novek, which included the answers to questions asked by SA Hutson, a criminal investigator. At trial, Dr. Novek admitted that not all statements made by J.H. were recorded. Thus, in no way can it be said that the statements of J.H. had the necessary guarantees of trustworthiness to be admitted as a firmly-rooted hearsay exception - (1) they were made to a physician who was acting as an evidence gatherer, (2) several of the questions were asked by a criminal investigator, and (3) the record of the statements was incomplete.

Perhaps most telling as to the true evidence gathering nature of the interview and examination of J.H. by Dr. Novek, was Dr. Novek's characterization of its necessity. Dr. Novek informed Ms. Flahardy that it was a "medical emergency" because the alleged abuse had occurred the night before and that any time abuse occurs within the last seventy two hours it constitutes a medical emergency. No reason was adduced at trial for the 72-hour limitation on the "emergency" label, but it was clear, from the nature of the evidence gathered and preserved by Dr. Novek, that his concern was the gathering and preservation of evidence. Thus, in reality, it was a legal or

"investigative emergency" in addition to whatever medical emergency he may have had as a physician.

The next interview of J.H. and R.H. took place at the request of the Petty Officer Hollis and for the purpose of assisting the defense. On August 26, 1997, trial defense counsel contacted Dr. Craig and asked her to assist the defense by reviewing the evidence and evaluating the children. Specifically, the defense asked Dr. Craig to try to determine whether or not prior abuse of J.H. and R.H. occurred at the hands of a former neighbor, Marcus, and, if so, whether J.H. was confusing the prior abuse with the role-playing of her father. The record is clear that Dr. Craig was working for the defense. Dr. Craig testified that she understood the defense counsel's request to be to "clarify what was going on . . . whether something might have happened with Marcus . . . there was some confusion over Marcus versus her father . . . ." There is no evidence in the record that defense counsel was engaging Dr. Craig to provide medical care or treatment to Petty Officer Hollis' children. On September 4, 1997, Dr. Craig met with J.H. and R.H. and conducted interviews and physical exams of the children. In accordance with the defense request, Dr. Craig questioned J.H. about Marcus first. Dr. Craig testified that J.H. did not want to talk about Marcus and then Dr. Craig began to investigate the allegations of abuse by Petty Officer Hollis which allegedly occurred in Naples. Dr. Craig pursued questioning J.H. about the allegations against her father because J.H., she testified, seemed to be forthcoming with the information. On September 8,

1997, Dr. Craig wrote a letter stating, among other things, that she concluded "by more than the preponderance of the evidence . . . that [Petty Officer Hollis] did indeed molest [J.H.] in the presence of [R.H.]." The use of the legal language, "by more than the preponderance of the evidence," (indeed it is a criminal evidentiary standard), belies the non-medical nature of the interview. On September 12, 2002, Dr. Craig memorialized the results of her interview and medical examination in a report which stated in part that "a full report would be provided to the authorities, both here and in Naples." Thus, the statements made to Dr. Craig were statements gathered primarily for preparation for trial by the defense, at the request of the defense, which in turn means they were statements not "reasonably pertinent to diagnosis or treatment." Thus, the statements fall outside the medical hearsay exception.

The next interview and examination occurred on September 30, 1997. On that day, J.H.'s grandparents called on Dr. Craig because J.H. wanted to talk to her. Dr. Craig stated that she was still working for the defense on the day that she saw J.H. at her request. Ms. Jacquelyn O'Reilly, a social worker with the Family Advocacy Program at Naval Station, Washington, took notes for Dr. Craig. The interview took place, not in a medical examination room, but in an NCIS child interview room at the National Naval Medical Center in Bethesda, Maryland. NCIS Special Agent Sherri Brown was present during the interview. NCIS Special Agent Brown took notes during the interview which were

incorporated into Dr. Craig's final report. The Special Agent was then consulted to review the case and made corrections and additions to Dr. Craig's report. Dr. Craig then faxed a copy of the report, as edited by SA Brown, to the other NCIS agent assigned to the case. Thus, while it can be said that this interview at least had some medical genesis in that the "patient," J.H., had asked to speak with Dr. Craig, the interview was fundamentally flawed as a possible medical hearsay exception. First, the interview had all the hallmarks of a criminal investigation. It was conducted in an NCIS interview room in the presence of a special agent who actively participated in the questioning. As such the interview, on appearances alone, loses its indicia and guarantees of trustworthiness. Second, even if the statement didn't lose on appearances, because of the editorial input by a criminal investigator into the final report, it cannot be established which questions, if any, were asked for medical purposes, and which were asked for investigatory purposes.

On October 23, 1997, Dr. Craig saw J.H. a third time because the prosecution asked her to interview J.H. The record does not provide any evidence that the prosecutor was authorized to obtain medical treatment for J.H. During this interview Dr. Craig elicited information pertaining to Petty Officer Hollis's assertions in his sworn statement to NCIS agents on August 11, 1997. Dr. Craig also spoke with J.H. about the possibility about having to testify in the presence of her father regarding the allegations. Based on J.H.'s expressed reluctance to testify,

allegedly motivated by fear of her father, Dr. Craig recommended that J.H. testify by means of closed circuit television monitoring. Predictably, however, J.H. did not testify at trial. The nature of this interview, i.e., having been at the request of the *prosecutor*, testing the veracity of Petty Officer Hollis's exculpatory statements, testing whether or not J.H. would serve well as a prosecutorial witness, recommending to the prosecutor that she should not appear, should render, beyond all doubt, that any statements taken therein fall well-outside the boundaries of the medical hearsay exception.

In summary, each of the three interviews in this case were so riddled with prosecutorial intent and action that they cannot be said to have arisen from the physician-patient relationship and therefore cannot "carry special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony. *Lilly v. Virginia*, 527 U.S. 116, 126. Thus, the courts below have grossly misinterpreted and misapplied this Honorable Court's explanation of the medical hearsay exception and have violated Petty Officer Hollis' Sixth Amendment right to confront the witnesses against him.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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October 2002

APPENDIX A

United States v. Hollis, 57 M.J. 74 (2002)

UNITED STATES, Appellee
v. Mark K. HOLLIS,
Journalist First Class U.S.
Navy, Appellant

No. 01-0337

UNITED STATES COURT
OF APPEALS FOR THE
ARMED FORCES

57 M.J. 74; 2002 CAAF
LEXIS 722

December 12, 2001, Argued

July 23, 2002, Decided

COUNSEL:
For Appellant: Lieutenant I. L. Paredes, JAGC, USNR (argued and on brief); Captain Curtis M. Allen, USMC.

For Appellee: Lieutenant Christopher J. Gramiccioni, JAGC, USNR (argued and on brief); Lieutenant William C. Minick, JAGC, USNR.

JUDGES:
GIERKE, J., delivered the opinion of the Court, in which CRAWFORD, C.J., and BAKER, J., joined. EFFRON, J., and SULLIVAN, S.J., each filed an opinion concurring in part and in the result.

OPINIONBY:
GIERKE

OPINION:

Judge GIERKE delivered the opinion of the Court.

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of rape, forcible sodomy, and indecent acts, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, *10 USC § § 920,* 925, and 934, respectively. The victim of the offenses was appellant's five-year-old daughter, J.H. The adjudged and approved sentence provides for a dishonorable discharge, confinement for 22 years, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. *54 M.J. 809 (2002).*

Before this Court, appellant has raised three issues arising from the admission, over defense

objection, of the testimony of two Navy medical officers, Lieutenant (LT) Stephen Novek and Captain (CAPT) Barbara Craig, relating statements made by J.H. and her three-year-old sister, R.H.[1] For the reasons set out below, we affirm.

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[1] The granted issues are:

I. WHETHER THE LOWER COURT ERRED WHEN IT AFFIRMED THE MILITARY JUDGE'S DECISION TO ALLOW LT NOVEK AND CAPT CRAIG TO PRESENT, OVER DEFENSE OBJECTION, THE INADMISSIBLE HEARSAY STATEMENTS OF J.H. AND R.H. TO THE COURT-MARTIAL.

II. WHETHER THE HEARSAY TESTIMONY BY LT NOVEK AND CAPT CRAIG IS INADMISSIBLE BECAUSE THE PRIMARY PURPOSE OF THEIR INTERVIEWS WAS TO COLLECT INCRIMINATING EVIDENCE AGAINST APPELLANT.

III. WHETHER APPELLANT WAS DENIED HIS RIGHTS TO CONFRONTATION AND DUE PROCESS BY THE ADMISSION OF HEARSAY STATEMENTS UNDER AN EXTENSIVELY BROADENED FORM OF THE MEDICAL TREATMENT HEARSAY EXCEPTION, WHICH IS NOT A FIRMLY ROOTED HEARSAY EXCEPTION.

The Evidence

In December 1995, appellant reported for duty at the U.S. Naval Support Activity in Naples, Italy. His estranged wife and two daughters remained in Arizona until April 1996, when the two daughters were escorted to Italy by Ms. Kathy Robie, who stayed in Italy as their live-in nanny.

On August 11, 1997, Ms. Robie had a conversation with J.H. that caused her to believe appellant had sexually abused her. Ms. Robie contacted the Family Services Center and told Ms. Lyn Flahardy about her conversation with J.H. Ms. Flahardy contacted LT Novek, a staff pediatrician who had previously treated J.H. as a patient. Ms. Flahardy told LT Novek that J.H. "had disclosed alleged sexual abuse" and asked him to see her. When Ms. Flahardy said that the most recent sexual abuse was "last night," LT Novek responded that it was a "medical emergency" and arranged to see J.H. later in the day "for a medical evaluation for alleged child sexual abuse." Ms. Flahardy and two agents from the Naval Criminal Investigative Service (NCIS) escorted Ms. Robie, J.H., and R.H. to the U.S. Naval Hospital, Naples, where J.H. was examined by LT Novek.

Ms. Flahardy, NCIS Special Agent (SA) Kevin Hutson, and Hospitalman Third Class Laura Rodriguez-Calderon were present during LT Novek's meeting with J.H. SA Hutson testified that LT Novek told him "he would be conducting a physical

examination of the girl, ... and desired to interview her."

LT Novek began by talking to J.H. about the importance of telling the truth, in order "to help her to understand that it was important that she explain things clearly and tell us the truth about what had gone on." LT Novek testified that J.H. knew who he was because he had previously treated her. Notwithstanding their previous contact, LT Novek told J.H. that he was a doctor and that he "was going to try to help her to figure out what had happened and to help her if she needed help." LT Novek testified that he knew J.H. understood he was trying to make her better, because "she was nodding and she recognized [him] from prior visits."

LT Novek then took a medical history, which he defined as "a series of questions that the physician asks of the patient to try to understand what is wrong with the patient and how to help the patient and how to treat the patient." During the medical history, J.H. told LT Novek that appellant had been touching her "private parts" and that it "hurt a lot." She also told LT Novek that appellant "used his hand to put medicine on in front and that he used his private part to touch her from behind and she pointed to her anus."

Toward the end of LT Novek's medical history interview, after J.H. had disclosed appellant's abuse, he invited the other persons present to ask questions. SA Hutson asked J.H. if appellant "said

this was a secret." She responded, "He said not to tell anybody, because he would go to jail." SA Hutson also had J.H. identify the partially used tube of Westcort cream prescribed to R.H. but used on J.H. by appellant. LT Novek testified that he asked all other questions.

After completing the medical history, LT Novek performed a complete physical examination of J.H. that included a detailed genital and anal examination. He identified vaginal injuries that were consistent with digital or penile penetration. He characterized his findings as "highly suspicious of abuse but non-confirmatory." In his written "progress note," LT Novek prescribed a plan that provided for treatment by a clinical psychologist.

In August 1997, appellant's trial defense counsel asked CAPT Barbara Craig, an experienced pediatrician at the National Naval Medical Center in Bethesda, Maryland, to evaluate J.H. and R.H., who were then six years old and four years old, respectively. CAPT Craig contacted the girls' grandparents and arranged a medical evaluation on September 4, 1997.

When CAPT Craig contacted the grandparents, she told the grandfather that "he needed to prepare the children for coming in by telling them they were coming to see a physician, a pediatrician, that [she] was a doctor, that [she] helps kids, and that it's always important to tell the truth to the doctor when children come in for a checkup." When CAPT Craig

first met J.H. and R.H. at the hospital, she explained that she was a "kids' doctor," that she "helps kids," that she would be asking a lot of questions, and that she wanted them to answer "as best they could." She was wearing a white coat and had a stethoscope around her neck. J.H. addressed CAPT Craig as "doctor."

Trial defense counsel had asked CAPT Craig to inquire about the possibility that J.H. had been abused by the son of her mother's boyfriend while she was living in Arizona with her mother. CAPT Craig testified that J.H. said the boy had done something bad or wrong to her and that she did not want to talk about it. When CAPT Craig began to ask questions about what happened in Italy, J.H. began shouting "no, no," and asked her to stop asking questions about it. J.H. told CAPT Craig that "something bad had happened with her dad," that "it happened in the bedroom in Italy, that it happened at nighttime, that it happened in the bed that she slept in with her father and her sister, [R.H.]." J.H. said that "her father told her not to tell about what was happening between her father and herself in Italy because he would go to jail." At this point, J.H. was "heaving, crying, yelling the answers." She was saying, "I just wanted it to stop, no, no." She was "yelling the answers ..., with her head in the corner and kind of rocking back and forth." CAPT Craig terminated the interview without completing the medical history, because of J.H.'s emotional state.

CAPT Craig was able to conduct a physical examination of J.H. on September 4. She found vaginal injuries consistent with penile or digital penetration. CAPT Craig also examined R.H. on September 4. She explained that she examined R.H. "because frequently children that are in the same home and in the same surroundings or conditions of the child who has been physically or sexually abused might suffer a physical or emotional trauma either by having the abuse occur to them or they can be equally traumatized by witnessing the abuse happen to someone else."

R.H. was four years and ten months old at the time of the examination. CAPT Craig explained to R.H. that she was a pediatrician, "and that's a doctor who takes care of tummy aches and rashes or whatever." R.H. interrupted her and blurted out, "I've had medicine for a rash before." CAPT Craig explained the importance of telling the truth, and R.H. told CAPT Craig that she understood. CAPT Craig testified that, in her opinion, R.H. knew she was a doctor and understood the need to tell her the truth.

During the medical history, R.H. told CAPT Craig that while sleeping in the same bed with appellant and J.H., she saw and heard appellant doing "yucky" and "bad" things to J.H. She saw appellant "opening [J.H.'s] privates with his hands," forcing J.H. to "eat" something in the middle of the night in bed, and kneeling over J.H. as she lay in

bed. R.H. said that she heard J.H. cry and ask appellant why he "does this" to her and not to R.H.

CAPT Craig talked with J.H. again on September 30, this time at J.H.'s request. J.H. remembered CAPT Craig and greeted her by saying, "Hello, Dr. Craig." J.H. indicated that she understood this second interview was to enable CAPT Craig to help her. During this interview, J.H. described acts of rape and said that it happened "a zillion times." She said that appellant kissed her on the mouth. She described being forced to perform fellatio on appellant, and she described appellant's digital penetration of her anus.

CAPT Craig recommended counseling for both J.H. and R.H. For J.H., she "strongly" recommended counseling consisting of "longer-term therapy."

Over defense objection, the military judge admitted the testimony of LT Novek and CAPT Craig under Mil. R. Evid. 803(4), Manual for Courts-Martial, United States (2000 ed.).[2] The defense objected to LT Novek's testimony as inadmissible hearsay, on the ground that there was an inadequate showing that J.H. "understood what benefit she was gonna gain from talking to this roomful of people." The defense also objected that LT Novek's testimony and written report were incomplete because the report did not include the questions preceding J.H.'s

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[2] All Manual provisions cited are identical to those in effect at the time of appellant's court-martial.

statements and "some portions of what happened in that interview [were] not recorded in this history." With respect to LT Novek's testimony, the military judge stated:

I specifically state for the record that the court has heard ample evidence that [J.H.] was aware of the circumstances for which she was at the doctor's office. She recognized the doctor from prior visits for medical treatment. The doctor and his staff advised her that she was there for possible medical treatment and to determine what was wrong with her so they could get treatment, and what had happened so she could be treated. No evidence to the contrary that she didn't understand that. In fact, the doctor indicated that in his opinion, she did, and his opinion is obviously based on previous exposure to her also.

With respect to R.H.'s statements to CAPT Craig, the military judge stated:

I find that [R.H.] understood that she was talking to a doctor that helped children. She understood the need to tell the truth and based on Dr. Craig's testimony that she understood that it was in her best interest to be truthful and that those truthful answers were necessary for any type of treatment, whether it was physical or counseling. Even though [R.H.] probably didn't know what the word counseling meant, but Dr. Craig said talk to for -- to make you better or words to that effect. Therefore, I

find that even though it is hearsay, it comes within M.R.E. 803(4), as medical exception to the hearsay rule.

Finally, with respect to J.H.'s statements to CAPT Craig, the military judge stated:

I find based on Dr. Craig's testimony that the statements made by [J.H.] to Dr. Craig on the 30th of September 1997 were for the purpose of promoting her well-being and receiving medical treatment or diagnosis, that [J.H.] knew she was talking to a medical professional. In fact, she greeted her as Dr. Craig, and she understood the need for truthful answers, that they were necessary for her treatment[.]

The prosecution's case-in-chief included the testimony of LT Novek and CAPT Craig relating the statements of J.H. and R.H., and physical evidence of J.H.'s vaginal injuries. It also included appellant's statement to SA Hutson, in which he admitted touching J.H.'s vaginal area and asserted that he was role playing in an effort to determine what had happened between J.H. and her mother's boyfriend's son. Finally, the prosecution case included deoxyribonucleic acid (DNA) evidence identifying 11 semen stains on J.H.'s nightgown as having come from appellant. Neither appellant nor his daughters testified.

Discussion

Appellant contends that there is no evidence J.H. understood she was being treated for sexual abuse or that she would receive any medical benefit for any ailments when LT Novek and CAPT Craig questioned her. He argues that the purpose of the interviews was to collect incriminating evidence and to smuggle in hearsay testimony using medical professionals acting in complicity with law enforcement officials. He asserts that admitting his daughters' statements under the medical exception violated his right to confront the witnesses. Finally, he asserts that he was denied due process when the Government, in bad faith, failed to preserve potentially material evidence by failing to videotape or audiotape the interviews of J.H. and R.H.

The Government argues that the military judge's decision to admit the statements of J.H. and R.H. was not an abuse of discretion and that his findings of fact were not clearly erroneous. The Government asserts that the purpose of the interviews was to elicit information for medical diagnosis or treatment, not prosecution. The Government asserts that appellant waived any issue about the availability of J.H. and R.H. by not raising it at trial. It argues that even if the availability issue was not waived, the right of confrontation was satisfied because the medical exception is a firmly rooted exception to the hearsay rule. Finally, the Government argues that there has been no showing of bad faith on the part of LT Novek and CAPT Craig, and that there is no

requirement that medical professionals use videotapes or audiotapes during medical examinations.

Standard of Review

A military judge's decision to admit evidence is reviewed for abuse of discretion. *United States v. Sullivan, 42 M.J. 360, 363 (1995).* We review a military judge's factfinding under the clearly erroneous standard of review, and conclusions of law we review de novo. Id. We will reverse if the findings of fact are clearly erroneous or if the military judge's decision is influenced by an erroneous view of the law. Id.

Confrontation

The "medical exception" is a firmly rooted exception to the hearsay rule, and, as such, it satisfies the constitutional right of confrontation. *White v. Illinois, 502 U.S. 346, 356, 116 L. Ed. 2d 848, 112 S. Ct. 736-57 (1992).* Thus, there is no need to establish that the declarant is unavailable as a witness.

Amissibility under Medical Exception

Under Mil. R. Evid. 803(4), "statements made for purposes of medical diagnosis or treatment and described medical history" are not excluded by the hearsay rule, even if the declarant is available. The proponent of evidence offered under the medical exception must establish that (1) the statements were made for the purposes of medical diagnosis or

treatment, and (2) that the declarant made the statement "with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *United States v. Edens, 31 M.J. 267, 269 (CMA 1990)* (internal citation omitted). "The key factor in deciding if the second prong is met is 'the state of mind or motive of the patient in giving the information ... and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed." *United States v. Kelley, 45 M.J. 275, 279 (1996)* (internal citation omitted). The determination whether the patient has the requisite state of mind is a preliminary question of fact under Mil. R. Evid. 104(a), and, as such, it will be overturned on appeal "only if clearly erroneous." *Id. at 280.*

A child-victim's expectation of receiving medical treatment need not be established by the child-victim's testimony. It may be established by the testimony of the treating medical professionals. See *United States v. Quigley, 40 M.J. 64, 66 (CMA 1994);* Edens, supra *31 M.J. at 268.* Although a medical doctor's determination that the child understood the need to be truthful can be an important component of the military judge's inquiry, the record must support the military judge's determination that the child had the requisite understanding and expectation of a medical benefit to satisfy the subjective prong, even if the military judge relies on the doctor's testimony to establish the factual

predicate for this determination. See *United States v. Williamson, 26 M.J. 115, 118 (CMA 1988),* quoted in Edens, supra *31 M.J. at 269* ("Although there may be some relaxing of the quantum of proof in those situations where a child is being treated, the facts and circumstances must support a finding that both prongs of the test were met.").

We hold that the military judge did not abuse his discretion by permitting LT Novek to testify about J.H.'s responses to his questions during his medical history interview. J.H. was taken to LT Novek's office at the Naval Hospital shortly after making an emotional disclosure to her nanny. J.H. had been treated previously by LT Novek and knew that he was a doctor. She indicated that she understood the need for truthful answers so that LT Novek could determine what had happened, in order to treat her.

Although appellant asserts that LT Novek was acting in complicity with law enforcement personnel and not for medical reasons, the record shows the contrary. LT Novek told Ms. Flahardy he needed to see J.H. immediately because it was a medical emergency. When J.H. arrived at his office, LT Novek told SA Hutson that he wanted to interview J.H. The impetus for the interview was LT Novek's concern about a medical emergency, not a request from SA Hutson for investigative assistance.

J.H.'s responses to the two questions asked by SA Hutson were not admissible under the medical exception. See *United States v. Armstrong, 36 M.J.*

311, 313 (CMA 1993) (responses to trial counsel's questions not admissible under Mil. R. Evid. 803(4)). In *United States v. Siroky, 44 M.J. 394, 400 (1996),* this Court recognized the responsibility of a military judge to scrutinize each segment of a statement offered under Mil. R. Evid. 803(4) to ensure that it satisfies both prongs of the test for the medical exception. We are satisfied, however, that the admission of LT Novek's testimony relating J.H.'s responses to SA Hutson's two questions was harmless beyond a reasonable doubt in light of the other evidence of appellant's guilt.

We also hold that the military judge did not abuse his discretion by admitting CAPT Craig's testimony. CAPT Craig examined the children, at defense counsel's request, to determine if they had been physically and emotionally traumatized. The record reflects that J.H. knew CAPT Craig was a medical doctor, that J.H. asked to see CAPT Craig on September 30, that J.H. addressed CAPT Craig as "Doctor Craig," and that J.H. knew CAPT Craig needed truthful answers to help her.

Similarly, R.H. indicated that she knew CAPT Craig was a doctor. R.H. demonstrated that she knew doctors help children, spontaneously announcing that a doctor had treated her skin rash. R.H. told CAPT Craig that she understood the need for truthful answers so that CAPT Craig could "make [her] better or words to that effect." CAPT Craig's professional assessment was that R.H. knew

she was a doctor who helped children and that R.H. understood the need to tell the truth.

Based on this record, we hold that the military judge's preliminary findings of fact were not clearly erroneous, and that he made his ruling based on a correct understanding of the law. Accordingly, we hold that, with the exception of LT Novek's testimony relating J.H.'s responses to SA Hutson's two questions, the military judge did not abuse his discretion by permitting LT Novek and CAPT Craig to testify about the victims' statements to them during their interviews. We further hold that the admission of the portion of LT Novek's testimony relating J.H.'s responses to SA Hutson's two questions was harmless beyond a reasonable doubt in light of the other evidence of appellant's guilt.

Failure to Preserve Evidence

Appellant's assertion that he was denied due process by the failure to audiotape or videotape the interviews of J.H. and R.H. is without merit for several reasons. First, there is no rule requiring that medical interviews be taped. Second, there is no indication in the record that material evidence was lost. To the contrary, the record reflects that the evidence was carefully preserved by the meticulous interview notes and diagnostic reports prepared by the medical professionals involved. Third, there is nothing in the record suggesting bad faith. See *Arizona v. Youngblood, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988)* ("We therefore hold

that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

Decision

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CONCURBY:
EFFRON; SULLIVAN

CONCUR:

EFFRON, Judge (concurring in part and in the result):

I agree with the majority opinion's conclusion that J.H.'s statements to Drs. Novek and Craig were properly admitted under Mil. R. Evid. 803(4). There are sufficient indicia of J.H.'s subjective intent in the record to show that she understood the purpose for speaking with each doctor and, in return, expected to receive a medical benefit as a result of those communications. See __ M.J. at (12-14). However, the record is less than clear as to the motivation of her younger sister, R.H., in speaking to Dr. Craig. The record does not demonstrate that R.H. (1) perceived a link or otherwise understood that her statements to Dr. Craig were for the purpose of medical diagnosis or treatment; (2) believed she needed to be helped, even in a general sense; or (3)

expected to medically benefit from responding truthfully when speaking with Dr. Craig.

We have held that "the key factor in deciding if the second prong is met is 'the state of mind or motive of the patient in giving the information ... and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed." *United States v. Kelley, 45 M.J. 275, 279 (1996)* (citation omitted). This standard applies equally to adults and children. As this Court made clear in *United States v. Williamson, 26 M.J. 115 (CMA 1988),* "Although there may be some relaxing of the quantum of proof in those situations where a child is being treated, the facts and circumstances must support a finding that both prongs of the test were met." *Id. at 118,* quoted in *United States v. Edens, 31 M.J. 267, 269 (CMA 1990).*

In this case, the majority opinion relies entirely on R.H.'s spontaneous statement, "I've had medicine for a rash before," __ M.J. at (6), and the military judge's finding, based on Dr. Craig's testimony, that "even though [R.H.] probably didn't know what the word [']counseling['] meant, ... Dr. Craig said talk to for -- to make you better or words to that effect," to satisfy the test's subjective prong. R.H.'s spontaneous statement merely establishes that she may have associated doctors with treating physical ailments. It does not demonstrate that R.H. acted on the belief that disclosing information about appellant's abuse of her sister would enable Dr.

Craig "to make [her] better." Cf. *Olesen v. Class, 164 F.3d 1096, 1098 (8th Cir. 1999)* (reversing where physician merely explained "what was going to happen" during the physical examination and no evidence was presented to show the child-victim understood revealing her abuser's identity was important to diagnosis and treatment).

I agree with the majority that the fact R.H. may not have known what the word "counseling" meant does not, in and of itself, render her statements inadmissible under the medical exception. However, the burden remained on the prosecution to present evidence establishing that R.H. understood she was there to receive counseling services or, at minimum, help in a general sense, although she may not have known "counseling" was the term to describe the treatment. *United States v. Avila, 27 M.J. 62, 66 (CMA 1988)* ("Unless it appears that the child knows at least that the person is rendering care and needs the information in order to help, the rationale for the [medical] exception disappears entirely."); *Kelley, 45 M.J. at 277, 280* (affirming where counselor introduced himself as a "talking doctor" and "the record supported the military judge's preliminary findings of fact that [the six-year-old victim] understood that Mr. Mills was trying to help her deal with unpleasant thoughts and feelings, and that she needed to tell him what she was thinking and

feeling."). The prosecution failed to present such evidence in this case. *

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* We have upheld admission of a six-year-old's statements to a psychologist upon finding that the second prong was "narrowly" satisfied where the mother testified that she "'encouraged' her 'daughter to speak openly with Ms. Miller [the psychologist] because she was there to help her'; and 'I've always asked [my daughter] to tell the truth.'" *United States v. Dean, 31 M.J. 196, 200-01 (CMA 1990).* There is no evidence in the record to show that R.H.'s grandparents, who had custody of her at the time of her interview with Dr. Craig, explained to R.H. the purpose of her visit with Dr. Craig or the importance of being truthful or that she needed to be truthful so that Dr. Craig could properly treat her. See also *United States v. Siroky, 44 M.J. 394, 400 (1996)* ("We recognize that a small child may not be able to articulate that he or she expects some benefit from treatment. Thus, it is often important for [the child's] caretakers to explain to [the child] the importance of the treatment in terms that are understandable to the child."). As the majority opinion notes, Dr. Craig testified that she asked the grandparents to "prepare" the children for a "checkup" and to tell them to be truthful. However, no evidence was presented to show that the grandparents did in fact prepare R.H. as requested.

Although R.H.'s statements were erroneously admitted, I believe the error was harmless in light of the Government's overwhelming evidence of appellant's guilt. The DNA evidence of appellant's semen stains on his daughter's pajamas and undergarments, the physical evidence of abuse observed by Drs. Novek and Craig, appellant's admission to touching his daughter's vaginal area, and J.H.'s statements admitted through Drs. Novek and Craig establish appellant's guilt beyond a reasonable doubt.

SULLIVAN, Senior Judge (concurring in part and in the result):

I have continued fear about admission of the testimony of very young children under the medical exception to the hearsay rule under Mil.R.Evid 803(4). In *United States v. Kelley, 45 M.J. 275, 282 (1996),* I stated in a separate opinion:

Moreover, let me express my growing uneasiness with the continuous expansion of and reliance upon the medical exception to the hearsay rule. Mil.R.Evid. 803(4). Here, a 6-year-old child's statements to a family counselor are taken as proof of a crime under Fed. and Mil.R.Evid. 803(4). Every day in America, countless statements are given in emergency rooms and medical offices by children, young adults, middle-aged, and elderly patients to doctors of medicine and their assistants. Are all these statements true? Are all these statements

admissible in court as the sole proof of a crime? I and my fellow judges should wonder about this and perhaps tighten application of this rule. I suspect that many statements given under the current breadth of the medical-exception umbrella, if closely scrutinized, may not be the complete truth. Motives should be thoroughly examined at the trial level before such statements are allowed as evidence in court.

On this basis, with regard to the statements of the three-year-old sister, R.H., I adopt the excellent opinion of my brother judge, Judge Effron. Nevertheless, like my brother, I come to the conclusion that the erroneous admission of R.H.'s testimony was harmless in light of the overwhelming evidence of appellant's guilt.

APPENDIX B

United States v. Hollis, 57 M.J. 74 (2000)

IN THE
U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

R.B. LEO D.A. ANDERSON K.J. NAUGLE

UNITED STATES

v.

Mark K. HOLLIS
Journalist First Class (E-6), U.S. Navy

Decided 15 December 2000

Sentence adjudged 2 April 1998.

Military Judge: G.T. Hatch.

Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, U.S. Naval Support Activity, Naples, Italy.

Capt CURTIS M. ALLEN, USMC,
Appellate Defense Counsel

LT FRANK M. DOHERTY, JAGC, USN,
Appellate Defense Counsel

LT WILLIAM C. MINICK, JAGC, USNR,
Appellate Government Counsel

LEO, Senior Judge:

Contrary to his pleas, the appellant was convicted before a military judge sitting as a general court-martial of rape, forcible sodomy, and commission of indecent acts with a person under 16 years of age, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. He was awarded a dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply; we have also considered the oral arguments by the parties on 1 November 2000. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant was charged with raping, forcibly sodomizing, and committing indecent acts upon his six-year-old daughter, JH, on divers occasions during the summer of 1997 in Naples, Italy. When interrogated by an agent from the Naval Criminal Investigative Service [NCIS], the appellant admitted only that he had touched JH while role-playing with her in an attempt to have her disclose to him how she had supposedly been molested several months earlier by a playmate when JH was still living with her mother. The Government's evidence at trial included statements that JH had made to two physicians, Drs. Novek and Craig, who interviewed and examined her on separate occasions. JH disclosed that the appellant had sexually abused her by engaging in activity that included forcible intercourse and sodomy. The Government also introduced the out-of-court statements of the four-year-old sister, RH, who was present when some of the alleged acts occurred. Medical examinations of JH revealed evidence of sexual abuse.

Over defense objection, the statements by JH and RH were admitted under the medical treatment exception to the hearsay rule. MIL. R. EVID. 803(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998

ed.).[1] Neither of the children testified at the trial in Naples because they had already returned to the United States. The appellant was eventually convicted of committing rape and indecent acts upon JH on divers occasions and of forcible sodomy.

II. Medical Treatment Exception to Hearsay Rule

The appellant contends that the military judge erred by admitting into evidence the out-of-court statements of the victim and her younger sister under the medical treatment exception to the hearsay rule. We disagree.

Generally, the standard of review when a military judge admits or excludes evidence is whether there was an abuse of discretion. *United States v. Sullivan*. 42 M.J. 360, 363 (1995); *United States v. Casey*, 45 M.J. 623, 627 (N.M.Ct.Crim.App. 1996).

> When the medical exception to the hearsay rule is involved, the question whether the patient has the requisite state of mind and expectation of receiving

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[1] Under Mil. R. Evid. 803(4), "[s]tatements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule.

> a medical benefit is a preliminary question of fact under Mil.R.Evid. 104(a). As such, it will be set aside "only if clearly erroneous."

United States v. Kelley, 45 M.J. 275, 280 (1996)(*quoting United States v. Quigley*, 40 M.J. 64, 66 (C.M.A. 1994)). After reviewing the record, we conclude that the military judge's findings are not clearly erroneous and, therefore, that he did not abuse his discretion in admitting the statements in question.

The rationale for the medical treatment exception is that "a patient undergoing diagnosis or receiving treatment from a trained medical professional has an incentive to be truthful because such answers will promote his own well-being." *United States v. Welch*, 25 M.J. 23, 25 (C.M.A. 1987). Accordingly, statements admitted under this exception are considered to be "inherently reliable," *United States v. White*, 25 M.J. 50, 51 (C.M.A. 1987), and the moving party need not show that the declarant is unavailable to testify in order for the statements to be admitted. MIL. R. EVID. 803; *United States v. Dean*, 31 M.J. 196, 203 (C.M.A. 1990). However, to be admissible, such evidence must satisfy a two-prong test: "[F]irst the statements must be made for the purposes of medical diagnosis or treatment; and second, the patient must make the statement with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *United States v. Faciane*, 40 M.J. 399,

403 (C.M.A. 1994)(internal quotes and citation omitted).

The patient's state of mind or motive in providing the statement is critical in determining the statement's admissibility. *Id.* "Obviously, very young children will not have the same understanding or incentive as adults when making statements to persons providing health care." *United States v. Avila*, 27 M.J. 62, 66 (C.M.A. 1988). Therefore, the test may be relaxed somewhat to take into account a child's capacity to comprehend the relationship or connection between her disclosure and the medical benefit that she expects to receive. *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990); *United States v. Williamson*, 26 M.J. 115, 118 (C.M.A. 1988).[2] In *Edens*, our superior Court held that the test for admissibility was met when the record showed that the children (three and five-years-old, respectively) understood (1) that they were seeing a doctor, (2) that they were being physically examined and questioned to determine what had happened to them, and (3) that the doctor needed this information in order to help them. *Edens*, 31 M.J. at 269. In cases of abuse, the evidence provided by a child under the medical treatment exception may include the identity of the

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[2] "Although there may be some relaxing of the quantum of proof in those situations where a child is being treated, the facts and circumstances must support a finding that both prongs of the test were met." *Williamson*, 26 M.J. at 118.

abuser when such information is reasonably necessary for the diagnosis or treatment of the child (e.g., a close relative as opposed to a stranger). *United States v. Deland*, 22 M.J. 70, 74 (C.M.A. 1986). The two-prong test for admissibility can be satisfied through the testimony of witnesses other than the child herself (e.g., health care provider or parent). *United States v. Cox*, 45 M.J. 153, 157 (1996); *Quigley*, 40 M.J. at 66.

A. Interview of JH by Dr. Novek

The first physician to examine JH was Dr. Novek, a staff pediatrician at the Naval Hospital in Naples, Italy. JH was referred to him on 11 August 1997, by a social worker from the Family Service Center [FSC] following an allegation of possible sexual abuse committed the night before. His purpose in examining JH was to determine if there had been abuse and if medical treatment or intervention was required. He stated that a routine part of a medical examination includes taking a detailed history from the patient to identify the symptoms and causes of any medical illnesses or injuries.

The appellant's defense counsel objected to the admission of any testimony by Dr. Novek under the medical treatment exception concerning what JH may have said. In overruling the defense objection, the military judge made the following findings:

I specifically state for the record that

> the court has heard ample evidence that [JH] was aware of the circumstances for which she was at the doctor's office. She recognized the doctor from prior visits for medical treatment. The doctor and his staff advised her that she was there for possible medical treatment and to determine what was wrong with her so they could get treatment, and what had happened so she could be treated. No evidence to the contrary that she didn't understand that. In fact, the doctor indicated that in his opinion, she did, and his opinion is obviously based on previous exposure to her also. So your objection is overruled.

Record at 95.

Dr. Novek testified that he identified himself to JH as a doctor; he told her that he was going to help her figure out what had happened and help her if she needed it. He believed that she understood the purpose of the visit because he had been her regular doctor before and had treated her during previous visits to the hospital. JH disclosed, among other things, that the appellant had touched her genital area and, in doing so, had caused her a great deal of physical pain. She added that the appellant told her not to tell anyone else because he would go to jail. She said that she did not want to go back to the

appellant because she was afraid it would happen again. Based upon the interview and the physical examination that he conducted, Dr. Novek stated that his findings were highly suspicious, but not conclusive, of abuse.

The appellant contends that the military judge erred because JH did not want to make a doctor's appointment, nor did she complain of being in need of medical treatment. She had been taken to the hospital by NCIS Special Agent Hudson for a medical examination after her nanny brought the abuse to the attention of the FSC staff; Special Agent Hudson was also present when Dr. Novek interviewed her. The appellant argues that Dr. Novek's general inquiry at the end of the interview to those in the room, asking if anyone had any questions, shows that this was not an interview conducted for medical purposes and that Dr. Novek was merely participating in a criminal investigation into the alleged abuse.

The focus of the appellant's argument is misplaced. First, as our superior Court recognized in *United States v. Siroky*, 44 M.J. 394, 399 (1996), young children "are not expected to seek out medical treatment independently, but instead rely upon their caretakers to obtain treatment when necessary." Second, JH's interview was conducted by trained medical personnel. Although Special Agent Hudson attended the interview, there was little evidence at

trial to show that he participated in it.[3] Third, the mere fact that JH was transported to the hospital by an NCIS agent does not undermine the medical basis of her statements to Dr. Novek. *See Deland*, 22 M.J. at 73 (key to statement's admissibility is child's intent in speaking to psychiatrist, not mother's intent in bringing child to psychiatrist). Accordingly, we are satisfied that Dr. Novek was seeking the kind of information that medical personnel need to diagnose and treat young patients who may have been abused, that he was seen by JH as her doctor, and that she confided in him believing that he would provide her with medical assistance if she needed it.

B. Interviews of JH by Dr. Craig

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[3] HM3 Rodriguez-Calderon, the hospital corpsman who was at the interview, testified during the trial that she remembered the agent talking, but did not recall him directing any questions to JH. Record at 83. At the Article 32, UCMJ, investigation, however, Dr. Novek did testify that towards the end of the interview--after JH had disclosed the abuse to him--Special Agent Hudson asked JH some additional questions about what the appellant may have said to her concerning the abuse and why he was doing it to her. See Investigating Officer's Report of 6 November 1997, Transcript of Testimony of Witnesses at 6-7. Even though this information was not introduced at trial, we do not believe that it is significant enough to have changed the essential character of Dr. Novek's interview with JH.

The other physician who examined JH was Dr. Craig, a pediatrician at the National Naval Medical Center and an expert in the area of child abuse. She testified about disclosures made to her by JH over the course of two interviews.

Dr. Craig was brought into the case at the request of the appellant's trial defense counsel, who wanted another evaluation and examination of JH by a different medical expert. She conducted her initial interview of JH on 4 September 1997, at her office in Bethesda, Maryland. As before, the appellant's defense counsel objected to any testimony about JH's disclosures. The military judge overruled the objection and made the following findings:

> I find that [JH], who is the subject of the interview, knew she was talking to a medical professional, she specifically called Dr. Craig, "doctor," and that she understood that truthful answers were necessary for treatment, and I find that no way inconsistent with a reluctance to answer or being emotional.

Record at 189.

Dr. Craig advised JH when she met her that she was a doctor who "[took] care of children with tummy aches, sore throats, earaches, or other problems which we can treat and try to make

better." Prosecution Exhibit 15 at 3. She also advised JH that she "[took] care of children who need to talk to us about things that might have happened to them." *Id.* Dr. Craig testified that she was wearing a white lab coat and had a stethoscope with her at the time of the interview. She ascertained that JH knew the difference between the truth and a lie and advised JH that it was important to tell the truth so she could determine what had happened and if there was a problem. JH became extremely upset when asked about the events in Italy. She managed to disclose that something bad had happened with her dad in the bed where they slept and that her dad had told her that he would go to jail if she told anyone about it. Although visibly agitated, JH refused to go into any detail, but did tell Dr. Craig that she wanted what had happened in Italy to stop. Due to JH's emotional state, Dr. Craig terminated the interview and proceeded to the physical examination. Based on the interview and the physical examination, her medical diagnosis was that JH had been emotionally traumatized and was most likely suffering from a post-traumatic stress disorder.

On 30 September 1997, Dr. Craig conducted a second interview after JH indicated a desire to meet with her again. The appellant's defense counsel objected to testimony about JH's statements from this interview, as well. Before ruling, the military judge made the following findings:

> So, and you also heard the doctor just testify that she was willing to change her plan and impression, her diagnosis if -- if the information she got on the 30th were different. . . . So, with that in mind, I find based on Dr. Craig's testimony that the statements made by [JH] to Dr. Craig on the 30th of September 1997 were for the purpose of promoting her well-being and receiving medical treatment or diagnosis, that [JH] knew she was talking to a medical professional. In fact, she greeted her as ["]Dr. Craig["] and she understood the need for truthful answers, and that they were necessary for her treatment, and your objection is overruled.

Record at 249.

Dr. Craig testified that when they met again, JH addressed her as "Dr. Craig" and appeared to understand that the medical history still needed to be completed. Dr. Craig indicated a need for the additional information to better understand what had happened to JH and, if necessary, to change the diagnosis and treatment plan in her initial evaluation report of 12 September 1997, Prosecution Exhibit 15.

On appeal, the gist of the appellant's objection is that the first prong of the medical treatment

exception was not met. The appellant argues that Dr. Craig was initially consulted as a possible expert witness and not as a treating physician for JH. Therefore, Dr. Craig's questions were solely to elicit information for the purpose of litigation and not medical treatment. As further evidence in support of his argument, he claims that an NCIS agent was present during Dr. Craig's second interview of JH.

Although Dr. Craig may have been consulted initially by the appellant for litigation purposes, we do not believe it places her testimony about JH's disclosures outside the scope of Mil. R. Evid. 803(4). *See* STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 948 (4th ed. 1997)(editorial comment cites Advisory Committee's Note on Federal Rule of Evidence 803(4), the source of our military rule, as authority for the proposition that Mil. R. Evid. 803(4) also includes statements made to doctors who diagnose or are consulted for litigation purposes). Statements obtained by medical personnel in these types of cases almost always have the potential for dual uses in the medical and investigative arenas. Therefore, in determining the admissibility of statements under the medical treatment exception, we must examine the circumstances in which the statements were made. In other words, were they made for the purpose of medical diagnosis and treatment, or for some other nonmedical purpose?

In this case, JH and RH were under the care of their paternal grandfather at the time of their interviews. According to Dr. Craig, she reviewed the case reports and wanted the grandfather to get the children into counseling if there was evidence of abuse. She could assist them by doing the medical evaluations; if needed, she could also provide the referrals that would enable the children to obtain counseling under their medical insurance plan. Even though Dr. Craig may have been asked by the trial defense counsel to examine JH in the hope that her findings could be helpful to the appellant, the fact remains that Dr. Craig's examination of JH and the disclosures that she elicited from this child had a medical purpose. In fact, there is nothing in the record to suggest that she conducted her examination of JH any differently than she would with any other patient she was evaluating for possible treatment. The presence of an NCIS agent who did nothing more than take notes while the doctor was obtaining the patient's medical history does not, in this instance, alter our view that the statements by JH were made for a medical purpose. Hence, we find that the first prong of test was met.

We find that the second prong of the test has been met as well. Dr. Craig introduced herself to JH as a doctor who helped kids; she wore the accouterments of a doctor when she conducted the interviews and examination; and she advised JH that she wanted the truth so she could determine if there was a problem. JH had been to a hospital and

been treated by a doctor before, so we can assume that, even for a six-year-old child, she had some general understanding of who she was seeing and why. The mere fact that JH was initially reluctant to provide details of the abuse does not diminish her expectation of a benefit when she did finally decide to disclose the details. *See e.g., United States v. Clark*, 35 M.J. 98, 105 (C.M.A. 1992)(finding a five-year-old child's statements admissible under medical treatment exception despite her initial lack of cooperation). By telling Dr. Craig that she wanted the abuse to stop, JH expressed a desire to be helped. Later on, when she was calmer about disclosing the details of the abuse, all indications from Dr. Craig's descriptions were that JH expected to be helped by providing this information to the doctor.

C. Interview of RH by Dr. Craig

On 4 September 1997, Dr. Craig conducted a medical interview and examination of RH, as well, and later testified at trial about RH's disclosures to her. Although there was no allegation that RH had been sexually abused by the appellant, Dr. Craig testified that, in her experience, when one child has been abused, it is not uncommon for other children in that household either to be abused or to be traumatized in witnessing the abuse of another. As a result, these children may also require medical treatment or therapy. The appellant's trial defense counsel objected to the admission of any statements

that RH made concerning JH. The military judge overruled the objection and made the following findings:

> Well, I find that [RH] understood that she was talking to a doctor that helped children. She understood the need to tell the truth and based on Dr. Craig's testimony that she understood that it was in her best interest to be truthful and that those truthful answers were necessary for any type of treatment, whether it was physical or counseling. Even though [RH] probably didn't know what the word ["]counseling["] meant, but Dr. Craig said talk to for--to make you better or words to that effect. Therefore, I find that even though it is hearsay, it comes within M.R.E. 803(4), as medical exception to the hearsay rule.

Record at 230.

Dr. Craig told RH that she was a doctor who helped children by taking care of things such as "earaches or rashes or other problems." Prosecution Exhibit 34 at 1. She ascertained to her satisfaction that RH knew the difference between a true statement and a lie. When asked if anything had ever happened in bed between JH and her dad, RH said that something had happened and described it as "bad

and yucky." Record at 231. When asked what she meant by "yucky," RH stated that she saw the appellant "open [JH's] private parts with his hands," Record at 232, and demonstrated what she had seen by spreading her legs and placing both of her hands over her genital area. She also said that the appellant told JH to eat something in bed that night. She described the appellant kneeling over JH and telling her not to chew it. RH described and demonstrated how the appellant had placed a pillow under JH's face while JH had her buttocks raised in the air and how he had touched JH there. Dr. Craig concluded by the way RH reacted that she was upset by it and would need counseling, as well.

The appellant contends that neither prong of the medical treatment exception was met. He argues that this information was not elicited for medical diagnosis or treatment, but to facilitate an ongoing criminal investigation. Because the statements of RH related to someone other than herself, he claims that she could not have made these statements with any expectation of receiving a personal benefit.

The appellant's argument fails to consider the statements of RH in their proper context. It is common knowledge that psychological trauma can be just as devastating to the well being of an individual, particularly a child, as physical trauma. Dr. Craig interviewed RH in order to determine whether she might be experiencing emotional problems from the abuse of her sister; this was sufficient to show that the

interview was for medical diagnosis and treatment. In conducting the interview, Dr. Craig was careful to ensure that RH knew and accepted that she was a doctor who helped children with their medical problems and that RH needed to answer truthfully in order to be helped. For a child of tender years, this was sufficient to establish an expectation of a medical benefit for the statements that she subsequently provided. *See* Prosecution Exhibit 34 at 8 (Dr. Craig's medical evaluation report of 15 September 1997). Accordingly, we find that the two-prong test for the medical treatment exception was satisfied with respect to the statements of RH.

D. Violation of the Confrontation Clause

Finally, the appellant challenges the admission of the children's statements on the grounds that his Sixth Amendment right of confrontation was violated. He argues that, unlike the traditional adult standard, the medical treatment exception as applied to young children is not a firmly rooted exception to the hearsay rule because the case law that allows their statements to be admitted under a more relaxed standard is relatively new. Thus, he argues, the Government failed to show that the declarants were unavailable to testify and that their statements had the particularized guarantees of trustworthiness making cross-examination unnecessary.

By failing to raise this constitutional argument at trial the appellant forfeited it as grounds for appeal. *Edens*, 31 M.J. at 267 n. 1; MIL. R. EVID. 103(a)(1). However, assuming *arguendo* that he did not forfeit it, he also fails to cite any legal authority in support of his argument that the statements of young children are not included under the medical treatment exception to the hearsay rule. Moreover, the decisions of the Supreme Court and our superior court suggest otherwise.

"The admission of out-of-court statements of child victims in sexual abuse cases is governed by the holding in *Idaho v. Wright*, 497 U.S. 805, 111 L. Ed. 2d 638, 110 S.Ct. 3139 (1990)." *United States v. Sumner*, 204 F.3d 1182, 1185 (8th Cir. 2000). In *Wright*, the Supreme Court declared that, although directed at similar concerns, the requirements of the Confrontation Clause are not the same as those governing the rule against hearsay; in fact, the Confrontation Clause may bar admission of evidence that would otherwise be admissible under an exception to the hearsay rule. *Wright*, 497 U.S. at 814. The Confrontation Clause does two things with respect to hearsay exceptions: first, it imposes a "rule of necessity" by requiring the Government to show that the declarant is unavailable to testify; second, it requires that the declarant's out-of-court statements bear adequate "indicia of reliability." *Id.* at 814-15. However, the Court also stated that "[r]eliability can be inferred without more" in the case of statements lying within a firmly rooted

exception to the hearsay rule or statements showing particularized guarantees of trustworthiness. *Id.* at 815.

In *White v. Illinois*, 502 U.S. 346 (1992), the Supreme Court affirmed the judgement of the state appellate court, which held that the statements made by a four-year-old sexual assault victim to an emergency room nurse and a physician were properly admitted under the medical treatment exception, even though she did not testify at trial. *Id.* at 358. In doing so, the Court held that the rule of necessity was not a requirement for spontaneous declarations and *statements made for medical treatment*, which were recognized without equivocation by the Court as firmly rooted exceptions to the hearsay rule. *Id.* at 357 (emphasis added). Our superior military Court has similarly held that the statements of young children who did not testify at trial were admissible under the medical treatment exception. *See Clark*, 35 M.J. at 106; *Edens*, 31 M.J. at 269; *Dean*, 31 M.J. at 204. Accordingly, we find no basis for the appellant's contention that his Sixth Amendment right of confrontation was violated.

III. Factual Sufficiency

In his next three assignments of error, the appellant contends the evidence is factually insufficient to prove that he is guilty of the charges. We disagree.

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The statements that JH and RH gave to the physicians were obviously crucial to the Government's case because they provided the details of the sexual abuse and identified the appellant as the perpetrator. We found these statements, on the whole, to be trustworthy, coherent, and credible, given the ages of these children and their ability to comprehend and respond during the medical interviews. Whatever inconsistencies and ambiguities may have existed were not significant enough to diminish our overall assessment of the strength of the Government's case.

The initial reluctance of JH to fully cooperate was not unexpected, according to the trial experts, in light of the trauma resulting from such abuse and the gradual process of disclosure that generally occurs among children who have experienced it. The information provided to the doctors by JH and RH was corroborated in important respects by the medical examinations of JH's hymen following the abuse and the forensic analysis of her nightgown, which confirmed the presence of the appellant's semen. After reviewing all of the evidence, we are convinced

beyond a reasonable doubt of the appellant's guilt as to each of the charges.

IV. Sentence Appropriateness

In his final assignment of error, the appellant contends that his sentence is inappropriately severe in light of his 14 years of naval service. We disagree.

For this court, "[s]entence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This process requires the "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(internal quotes and citation omitted).

In reviewing the record, we weighed the seriousness of the appellant's offenses and the long-term impact they are likely to have on the victim against the matters offered by the appellant in extenuation and mitigation, including his 14 years of naval service. As a parent, the appellant was responsible for the care and protection of his two young children. Instead, over a period of several months, he used the oldest child as an object for his own sexual gratification. The amount of punishment that he received as a result is simply commensurate with the type of offenses that he committed.

Accordingly, we do not find his sentence to be inappropriately severe.

V. Disposition

We affirm the findings and sentence as approved on review below.

Judge ANDERSON and Judge NAUGLE concur.

For the Court

R.H. TROIDL
Clerk of Court